

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

HOMESALES, INC.,

Plaintiff,

vs.

RALPH D. MITCHELL; ALL PERSONS IN  
POSSESSION;

Defendants.

No. 03:10-cv-00792-HU

RALPH D. MITCHELL,

Third-Party Plaintiff,

vs.

HOMESALES, INC., a foreign  
corporation; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., a  
foreign corporation; CHASE BANK,  
USA, N.A., a foreign corporation;  
and CHASE HOME FINANCE, LLC, a  
foreign corporation;

Third-Party Defendants.

ORDER FOR REMAND

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17  
18 HUBEL, Magistrate Judge:

19 On July 9, 2010, the Third-Party Defendants removed the above-  
20 captioned case to this court, asserting the court has federal  
21 question jurisdiction under 28 U.S.C. § 1441(b). Dkt. #1. The  
22 only pleading attached to the Notice of Removal was the  
23 "Defendant's Answer and Counterclaim and Third-Party Plaintiff's  
24 Complaint," in which the Defendant Mitchell asserts counterclaims  
25 against Homesales, Inc., and third-party claims against all of the  
26 other Third-Party Defendants. Notably, the original petition filed  
27 by Homesales against Mitchell was not attached to the Notice of  
28

1 Removal. It appears the Third-Party Defendants are attempting to  
2 remove *only* the third-party action, and not the original action.

3 The scheduling of deadlines in the case was delayed several  
4 times at the parties' request while they engaged in largely  
5 unsuccessful settlement negotiations. One defendant, Northwest  
6 Trustee Service, Inc., was dismissed from the case on November 23,  
7 2010, with the consent of all parties. Dkt. #24.

8 On November 4, 2010, the Third-Party Defendants filed a motion  
9 to dismiss Mitchell's counterclaim and third-party claims. Dkt.  
10 #17; see also Dkt. #18, supporting memorandum, and Dkt. #19,  
11 request for judicial notice of certain documents. Mitchell filed  
12 a response to the motion on July 25, 2011. Dkt. #32.

13 Preliminarily, however, the court raised *sua sponte* the issue  
14 of whether the court has subject matter jurisdiction of this action  
15 at all. "The court has an independent obligation to examine  
16 whether it has subject matter jurisdiction before deciding any  
17 issue on the merits." *Abraham v. Nat'l Collegiate Athletic Ass'n*,  
18 slip op., No. CV-11-359-ST, 2011 WL 1357469, at \*1 (D. Or. Apr. 11,  
19 2011) (Stewart, M.J.) (citing *Valdez v. Allstate Ins. Co.*, 372 F.3d  
20 1115, 1116, (9th Cir. 2004)). "If at any time before final  
21 judgment it appears that the district court lacks subject matter  
22 jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

23 The removal statute provides that a case "may be removed by  
24 the defendant or the defendants." 28 U.S.C. § 1441(a). Several  
25 courts have examined the issue of whether third-party defendants  
26 fall within the definition of "defendants" for purposes of section  
27 1441(a). In *Columbia State Bank v. Daybreak Estates, LLC*, slip  
28 op., No. 10-cv-1284-AC, 2011 WL 832132 (D. Or. Feb. 9, 2011)

1 (Acosta, M.J.), the court examined the issue in some detail,  
2 including discussing existing case law on the issue, and "adopt[ed]  
3 the majority position that the phrase 'the defendant or the  
4 defendants' in § 1441(a) is limited to the original defendant or  
5 defendants and that third-party defendants lack the authority to  
6 remove state court actions under this statute." *Id.* at \*7.

7 The Ninth Circuit has not addressed this specific issue.  
8 However, in *California v. Keating*, 986 F.2d 346 (9th Cir. 1993),  
9 the court observed that under the "voluntary/involuntary rule," a  
10 case that is "transformed into an action 'arising under' federal  
11 law not by the voluntary action of the plaintiff, but instead by  
12 action of a defendant" - e.g., by filing a counterclaim that  
13 contains claims arising under federal law - "must remain in state  
14 court." *Id.*, 986 F.2d at 348.

15 "The removal statute is strictly construed against removal  
16 jurisdiction." *Provincial Gov't of Marinduque v. Placer Dome,*  
17 *Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009) (citing *Sygenta Crop*  
18 *Prot., Inc. v. Henson*, 537 U.S. 28, 32, 123 S. Ct. 366, 154 L. Ed.  
19 2d 368 (2002); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d  
20 831, 838 (9th Cir. 2004)). As the parties invoking federal  
21 jurisdiction, the burden is on the Third-Party Defendants to  
22 establish that removal is proper. *Id.*; *Gaus v. Miles, Inc.*, 980  
23 F.2d 564, 566 (9th Cir. 1992). Accordingly, the court ordered the  
24 Third-Party Defendants to file a brief in support of their  
25 assertion that this court has subject matter jurisdiction over the  
26 instant action.

1 The Third-Party Defendants filed their brief on August 15,  
2 2011. Dkt. #40. Mitchell did not file a timely response, and the  
3 matter is now under advisement.

4 The Third-Party Defendants argue this court has federal  
5 question jurisdiction based on Mitchell's claims under the federal  
6 Truth in Lending Act (TILA), 15 U.S.C. § 1601, and the Real Estate  
7 Settlement Procedures Act (RESPA), 12 U.S.C. § 2601. *Id.*, p. 2.  
8 As discussed above, however, Mitchell's addition of federal claims  
9 in his counterclaim and third-party claims did nothing to change  
10 the original nature of the action. The original action was filed  
11 solely under state law, and that is what controls. The Third-Party  
12 Defendants attempt to distinguish *Keating* by arguing that Homesales  
13 never reasonably expected that Mitchell would raise federal claims  
14 "within that same action" as the original case. *Id.*, p. 5  
15 (emphasis in original). They further argue that if the case is  
16 remanded, the state court will have to "interpret and apply  
17 intricate federal statutes such as the Truth in Lending Act." *Id.*,  
18 p. 3. These arguments are unavailing. The defenses and counter-  
19 claims Homesales contemplated that Mitchell might assert in the  
20 case are irrelevant.

21 Moreover, the state courts are perfectly competent to decide  
22 the issues of federal law raised in this action. Indeed, the  
23 courts of Oregon have addressed issues arising under TILA and RESPA  
24 on numerous occasions. *See, e.g., Washington Mutual Bank v.*  
25 *Freitag*, 242 Or. App. 538, \_\_\_ P.3d \_\_\_, 2011 WL 1662120 (May 4,  
26 2011) (considering whether loans for construction of two beach  
27 homes were subject to TILA and RESPA); *Vasquez-Lopez v. Beneficial*  
28 *Oregon, Inc.*, 210 Or. App. 553, 152 P.3d 940 (2007) (state court

1 held jury trial on state law and TILA issues); *Porter v. Hill*, 314  
2 Or. 86, 838 P.2d 45 (1992) (considering whether late payment charge  
3 imposed by attorney on client's balance due was subject to TILA  
4 disclosure requirements); *Vaughn v. U.S. Nat'l Bank of Oregon*, 79  
5 Or. App. 172, 718 P.2d 769 (1986) (TILA action by credit card  
6 holder for unauthorized use of his credit card by third party);  
7 *Mortgage Mint Corp. v. Morgan*, 76 Or. App. 174, 709 P.2d 1177  
8 (1985) (considering, in context of lender foreclosure action,  
9 whether borrowers waived right of rescission under TILA); *Long v.*  
10 *Storms*, 52 Or. App. 685, 629 P.2d 827 (1981) (case for recovery of  
11 attorney's fees under TILA after successful action in state court  
12 to enforce TILA civil penalties); *see also Fredericks v. Universal*  
13 *Underwriters Ins. Co.*, 140 Or. App. 269, 915 P.2d 472 (1996)  
14 (comparing objectives of disclosure provisions of federal TILA with  
15 their state and local counterparts); *Hobson v. Hobson*, 136 Or. App.  
16 516, 901 P.2d 914 (1995) (comparing garnishment earnings exemption  
17 under state law with federal wage garnishment limitations included  
18 in the TILA).

19 The court adopts the majority position that third-party  
20 defendants lack the authority to remove state court actions to  
21 federal court under 28 U.S.C. § 1441(a). "Where, as here, a party  
22 seeks to expand the federal court's jurisdiction, such request  
23 should be rejected in the absence of clear supporting authority."  
24 *Columbia State Bank*, 2011 WL 832132, at \*7. The Third-Party  
25 Defendants have failed to provide "clear supporting authority" to  
26 support their jurisdictional claim. Accordingly, the court finds  
27 the Third-Party Defendants removed this action to federal court  
28 improperly, and the case is **remanded** to the Clackamas County

1 Circuit Court. Because the court lacks jurisdiction over this  
2 action, it will not address the Third-Party Defendants' alternative  
3 arguments or their request that the third-party claim be severed  
4 from the primary claim. See *id.*

5 IT IS SO ORDERED.

6 Dated this 1st day of September, 2011.

7 /s/ Dennis J. Hubel

8 Dennis James Hubel  
9 Unites States Magistrate Judge